

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

NO. 77-4162

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CROSS-SOUND FERRY SERVICES, INC.)

Petitioner,)

v.)

THE UNITED STATES OF AMERICA and)
INTERSTATE COMMERCE COMMISSION)

No. 77-4162

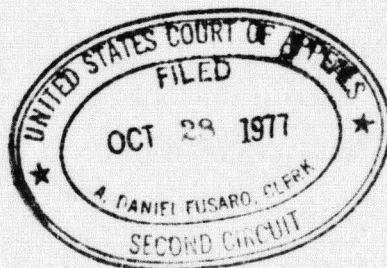
Respondents,)

NATIONAL RAILROAD PASSENGER CORPORA-)
TION (AMTRAK), MASCONY TRANSPORT AND)
FERRY SERVICE, INC., et al.,)

Intervenors.)

PETITION FOR REVIEW
OF A DECISION OF THE
INTERSTATE COMMERCE COMMISSION

BRIEF FOR INTERVENOR
NATIONAL RAILROAD PASSENGER CORPORATION



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Dated: October 26, 1977

Table of Contents

	<u>Page</u>
Table of Authorities.	1
Issue Presented	2
Statement of the Case	2
Argument	6
Conclusion.	9
Exhibit 1	10
Certificate of Service.	16

Table of Authorities

<u>Cases</u>	<u>Page</u>
<u>Isbrandtsen Co. v. U.S.</u> 96 F. Supp. 833 (S.D.N.Y. 1951).	7
<u>Prevention of Rail-Highway Grade Crossing Accidents</u> 322 I.C.C. 1 (1964).	8
<u>S.C. Loveland Co., Inc. v. U.S.</u> 534 F.2d 958 (D.C. Cir. 1976).	7
 <u>Statutes</u>	
National Environmental Policy Act of 1969 42 U.S.C. § 4332, <u>et seq.</u>	3
23 U.S.C. § 322(a)	8
 <u>Legislative Reports</u>	
Senate Report No. 93-1111, 93d Cong., 2d Sess. (1974).	8

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PETITION FOR REVIEW
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BRIEF FOR INTERVENOR
NATIONAL RAILROAD PASSENGER CORPORATION

Issue Presented

Whether the Interstate Commerce Commission abused its discretion in refusing to permit Amtrak to intervene in the administrative proceeding?

Statement of the Case

This case represents a clash between a private impeding interest and the \$1.9 billion Federal Northeast Corridor Improvement Project which is designed to expedite and improve

rail service, make it safer and aid in the national environmental and energy conservation programs.

By application filed May 29, 1973, with the Interstate Commerce Commission ("Commission"), intervenor Mascony Transport and Ferry Service, Inc., ("Mascony"), sought authority to operate a ferry boat service, in interstate or foreign commerce, as a common carrier by water in the transportation of general commodities and passengers, between New London, Connecticut and Greenport, Long Island, New York.

The Commission held hearings on the application in October, November and December 1973 and in January and February 1974. In an initial decision served June 19, 1974, the Administrative Law Judge recommended that the application be denied because of operational considerations: safety at New London and environmental at Greenport. Mascony filed exceptions to this initial decision together with a petition to reopen the proceeding for receipt of additional evidence.

By order of October 22, 1975, the Commission, Division 1, reopened the proceeding to accept certain evidence tendered by Mascony and directed that an evaluation of the environmental effects of the proposed service be made in accordance with the National Environmental Policy Act of 1969, 42 U.S.C. 4332, et seq. A draft environmental impact statement was prepared and served on February 3, 1976. Comments on this

draft were offered by various parties and the Commission incorporated its final environmental impact statement in its report and order served on November 16, 1976 wherein, with one member dissenting, it reversed the decision of the Administrative Law Judge and granted Mascony a three-year term certificate. Docket No. W-1270, Mascony Transport and Ferry Service, Inc. Initial Operations - New London to Greenport, Long Island, New York, 353 I.C.C. 60.

In an order served April 9, 1977, the Commission reopened the record and Mascony was required to submit additional evidence regarding docking, staging and loading at Greenport and New London, and protestants were invited to reply.

The National Railroad Passenger Corporation ("Amtrak") became aware of the existence of the proceeding in May 1977 and, because Mascony's proposal would entail the introduction of a heavy volume of vehicular and pedestrian traffic over a hitherto little used at-grade crossing on its main line between New York City and Boston, in New London, petitioned the Commission for leave to intervene to express its opposition due to safety concerns.

By order served on June 16, 1977, the Commission denied Amtrak's petition for leave to intervene. Amtrak's petition for reconsideration was denied by an order served August 29, 1977, and by order served on September 22, 1977, the Commission denied Amtrak's petition for an order declaring that issues of general transportation importance were involved.

By Orders dated September 27, 1977 and October 5, 1977,
this Court granted Amtrak's motion for leave to intervene
herein.

Argument

The Commission Abused Its Discretion In Denying Amtrak's Efforts to Participate in the Administrative Proceeding.

On June 7, 1977, Amtrak petitioned the Commission for leave to intervene and to file a verified statement in the then pending administrative proceeding. Amtrak informed the Commission that it had but recently learned of the proceeding and that it desired to protest certain particulars of Mascony's application which would entail the expanded use of a theretofore little used rail/highway grade crossing in New London. Amtrak stated that while Mascony's proposal would have no competitive impact, Amtrak was concerned with the adverse operational and safety impacts presented by the application. In support of its petition, Amtrak attached a verified statement of Mr. Bruce L. Gordon, Amtrak's Director of State Affairs. As it presents a comprehensive picture of Amtrak's concerns, we have attached it hereto. (Exhibit 1)

Much to Amtrak's shock and dismay, the Commission denied Amtrak's petition saying that the information Amtrak wished to present had been "substantially covered in the environmental impact statement" and because Amtrak's petition had come at a "late date". In its petition for reconsideration to the Commission, Amtrak pointed out that the environmental impact statement did not focus on the specific rail/highway

crossing in question and that the reason that its petition was "late" was because it had only learned of the existence of the proceeding in May 1977. Amtrak also noted that it assumed ownership of the subject rail line only on April 1, 1976, long after Mascony's application had initially been filed, and that Mascony first proposed to use the specific rail/highway grade crossing which triggered Amtrak's concern in April 1977, just shortly before the date of Amtrak's petition for leave to intervene. For the Commission to find Amtrak "late" and Mascony not is clearly arbitrary and capricious and does violence to the concepts of fundamental fairness and due process.

Amtrak contends that the Commission's action in so summarily disregarding the valid concerns of a responsible and interested petitioner which will be so directly involved with the resultant impact of approval of the application is clearly irresponsible and unacceptable. For the Commission to conclude, without even considering Amtrak's verified statement, that "no good or sufficient cause appears for again reopening this proceeding" is an obvious abuse of its discretion. See S. C. Loveland Co., Inc. v. U.S., 534 F.2d 958 (D.C. Cir. 1976). The Commission is under a duty to evaluate all pertinent facts, Isbrandtsen Co. v. U.S., 96 F. Supp. 883, 892 (S.D.N.Y. 1951), especially when they concern public safety.

While Amtrak takes no position on the merits of other aspects of the application, it is emphatically opposed to the dangerous introduction of such a large volume of vehicular and pedestrian traffic over a heretofore little used rail/highway grade crossing. This violates not only the basic congressional concept of eliminating all such crossings on the Northeast Corridor but also the limited exception to this policy for such crossings of "unusually low-potential hazard". 23 U.S.C. § 322(a); see S. Rep. No. 93-1111, 93d Cong., 2d Sess. 18-19 (1974). With the introduction of the traffic volume proposed by applicant, the crossing in question would no longer be of "unusually low-potential hazard", and, as the Commission itself has recognized, protection devices are of limited effectiveness. Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1, 10 (1964).

It is simply incredulous that the Commission would ignore Amtrak's crucial, and timely, views. Amtrak considers it is a breach of the Commission's responsibility and of its public trust

Conclusion

For the foregoing reasons, Amtrak respectfully requests that this Court reverse the Commission decision.

Respectfully submitted,

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Dated: October 26, 1977

Before the
INTERSTATE COMMERCE COMMISSION

Docket No. W-1270

MASCONY TRANSPORT AND FERRY SERVICES, INC.

- INITIAL OPERATIONS -

NEW LONDON TO GREENPORT, L.I., NEW YORK

VERIFIED STATEMENT OF
BRUCE L. GORDON

My name is Bruce L. Gordon. Since January 1, 1977, I have been Director of State Affairs for the National Railroad Passenger Corporation (Amtrak). Prior to that date, I was employed as Director of Amtrak's Grade-Crossing Program (from December 20, 1975 to December 31, 1976). This is a dynamic, extensive, on-going safety program which focuses on all aspects of the inherently dangerous circumstances which exist at rail/highway grade-crossings. My new duties encompass, among other things, all of the responsibilities of my previous position.

In reviewing the Commission's file involving the instant proceeding, I became very much concerned at the realization that approval of the requested authority, as presently proposed by the applicant, would necessarily

EXHIBIT 1

increase the potential and probability of future rail/highway grade crossing accidents. I was particularly sensitive to the fact that the specific grade-crossing which applicant proposes to use in conjunction with its ferry boat operations, that at Sparyard Street in New London, Connecticut, is located on Amtrak's high-speed, high-density, Northeast Corridor main line, which is presently being rehabilitated for even higher speed train operations. Contrary to applicant's proposal to increase the use of a rail/highway crossing on the Northeast Corridor, the Department of Transportation/Amtrak Improvement Project calls for the closing of, or at least the grade separation of, as many railroad crossings as is possible so as to improve the Corridor's safety profile and lessen interference with rail passenger services.

I was further concerned when, upon investigation into Sparyard Street, I found that an accident between one of our trains and an automobile had taken place at that crossing in April, 1977 resulting in injury to the sole occupant of the vehicle, the driver. I also determined that the Sparyard Street crossing lacks automatic traffic controlling signals and devices. Too, the crossing surface itself is in deplorable physical

condition and is woefully inadequate to efficiently provide for relatively safe and expeditious vehicular and/or pedestrian transit. Moreover, a driver's visibility is obstructed due to the geometric configuration and angle of the crossing, the track curvature in both directions and the buildings located on the Northeast and Southeast quadrants of the crossing.

More importantly, however, is the fact that the applicant's projected volume of people and motor vehicles to be loaded and unloaded at the Sparyard Street crossing, when added to present and projected rail passengers and freight, will produce such catastrophic potential for accidents that approval of the requested authority could result in a major national tragedy involving multiple fatalities and injuries.

Applicant estimates that it will book 66,385 vehicles and carry 300,000 passengers annually. This approximates 182 vehicles and 822 people per day. Amtrak presently operates some 7,765 trains per year via New London, carrying some 774,500 passengers annually. This averages 21 trains and 2,122 people per day. Amtrak has no immediate plans to decrease these services. With such a concentration of people, trains, and motor vehicles in constant modal conflict, the potential and

probability for increased accidents/incidents becomes significantly hazardous. Approval of the pending proposal would result in an almost infinite increase in the hazard potential at Sparyard Street. Applicant further projects that approximately 5% of the vehicles will involve trucks and tractor-trailers. Such vehicles only compound this undesirable mix inasmuch as they require manual manipulation of complex gearing mechanisms that take an inordinate amount of time to clear a crossing. The potential for accidents/incidents is further heightened by the seasonal nature of applicant's proposed operations and by possible peak period expansions of its service.

Some of the serious questions and problems that we, at Amtrak, believe require the Commission's close review and analysis in assessing the merits of applicant's proposal involve:

1. How will motor vehicles clear the crossing?
 - a. Driven by owners?
 - b. Driven by employees of applicant? or
 - c. Transported by auto carrier?
2. How will passengers clear the crossing?
 - a. By motorbus or other passenger transportation that may require manual manipulation of complex gearing mechanisms?

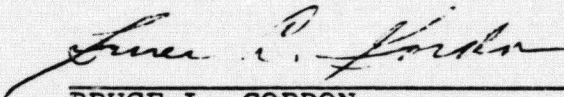
- b. By walking in small or large organized groups, escorted by trained crossing guards employed by applicant? or
- c. In an unorganized, leisurely fashion?
- 3. Are the handicapped identified, grouped, and given special transportation consideration for clearing the crossing?
- 4. Would applicant indemnify and hold the railroads harmless from liability for accidents/incidents that may result from this additional traffic?
- 5. In the loading aspect of this operation, what happens when the pier is full, with vehicles spilling over the crossing and beyond, and a train is approaching?

In conclusion, for the reasons above, Amtrak is very much opposed to the applicant's proposed use of the Sparyard Street crossing and would respectfully request that the Commission not grant its approval to such a deadly plan. In the alternative, at the very least, a grade separation structure should be required.

VERIFICATION

DISTRICT OF COLUMBIA: ss

I, BRUCE L. GORDON, being duly sworn, depose
and say that I have read the foregoing Affidavit, know
the contents thereof, and that the same are true as stated



BRUCE L. GORDON

Sworn to and subscribed before
me this 4th day of June, 1977.


My Commission Expires: 9/30/80

CERTIFICATE OF SERVICE

I hereby certify that I have served two (2) copies of the foregoing document upon the following, by first class mail, postage prepaid, this 26th day of October, 1977:

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